Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

WALTER JITNER

Petitioner

v.

COMMERCIAL FINANCIAL/SPC ACQUISITIONS, INC.

and

FINANCIAL COLLECTIONS, INC.

On Petition for Writ of Certiorari
To The U.S. Ninth Circuit Court of Appeals #98-56810

PETITION FOR WRIT OF CERTIORARI

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

I. QUESTIONS PRESENTED FOR REVIEW

1. This court in O'Melveny & Myers v. FDIC (1994) 512 US 79 reversed a ruling by the Ninth Circuit Court of Appeals and ruled that in a matter involving the FDIC and in the absence of a applicable federal statutory provision, there can be no federal common law. The courts must then apply state law. Under these circumstances may the Ninth Circuit Court of Appeals, subsequent to the O'Melveny ruling, ignore the relevant state law when rendering a decision involving the FDIC when this is no applicable federal statutory provision?

2. Under the circumstances described above in Question 1 and subsequent to the O'Melveny ruling, may the Ninth Circuit Court of Appeals create their own common law rule in rendering a decision regarding a FDIC matter when there is no applicable federal statutory provision?

3. California Commercial Code § 3203 ("§ 3203") provides that when there is no indorsement by the payee on the face of a note the possessor acquires no rights in the note unless the possessor provides proof of the transaction by which it acquired the note. Under the circumstances described above in Question 1 and subsequent to the O'Melveny ruling, may the Ninth Circuit Court of Appeals disregard § 3203 and create a Federal Common Law which allows the possessor to collect on a note when there has been no indorsement by the payee and the possessor failed to provide competent proof of the transaction by which the note was obtained?

II. LIST OF ALL PARTIES

Walter Jitner - Defendant and Petitioner
Commercial Financial/SPC Acquisitions, Inc.
and
Financial Collections, Inc.
(both Oklahoma Corporations)
Plaintiffs and Respondents

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V. CITATION TO OPINION BELOW

U.S. Ninth Circuit Court of Appeals # 98-56810

VI. STATEMENT OF JURISDICTIONAL GROUNDS

A. U.S. Ninth Circuit Court of Appeal # 98-56810

(1) Judgment of Appeal dated 5-3-01.

(2) Judgment on Rehearing dated 12-10-01

B. The statutory provision conferencing jurisdiction to review judgment is:

Supreme Court Rule 10 & Rule 10(a)

C. Notification under Rule 29.4(b) is not required

VII. RELEVANT CONSTITUTORY, STATUTORY & RELATED PROVISIONS

A. California Statute

California Commercial Code § 3203 and Official Comment 2 thereto.

(a copy is enclosed as document 5 in the Appendix - Section XI)

B. Maine Statute

11 MRSA § 3-1203 and UCC Comment 2 thereto

(a copy is enclosed as document 4 in the Appendix - Section XI)

VIII. STATEMENT OF THE CASE

This case was initiated by Commercial Financial/SPC Acquisitions Inc. ("COMMERCIAL") based, in part, on a $50,000.00 California promissory note ("1st Note") of which the original payee (or obliqee) was Independence Bank ("INDEPENDENCE"). Defendant and Petitioner herein, Walter Jitner ("JITNER"), as an accommodation borrower, appears on the face of the note as a one of the payors (or obligors).[1] This 1st Note, shows on its face an indorsement by the Federal Deposit Insurance Corporation ("FDIC"), in its corporate capacity, to COMMERCIAL. However, the note does not show an indorsement to the FDIC by the original payee on the face of the note, INDEPENDENCE.

Eventually a second plaintiff, Financial Collections Inc. ("FINANCIAL"), was added to the lawsuit. FINANCIAL sued on a $100,000.00 California promissory note ("2nd Note") on whose face the only payee (or obligee) was the Bank of Beverly Hills ("BEVERLY"). JITNER, as an accommodation borrower, appears on the 2nd Note as one of the payors (or obligors).[2] Like the 1st Note, this 2nd Note shows, on its face a FDIC indorsement, in this case to FINANCIAL. But, there is no indorsement by

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1. Peter Fullerton ("FULLERTON"), the person to whom the borrowed funds were paid, is the only other payor on this note.

2. Like the 1st Note the borrowed funds were paid to FULLERTON who is the only other payor appearing on the face of the note.

BEVERLY (original payee under the note) to the FDIC. The state of the record is summarized in chart form as follows:

	1st NOTE	2nd NOTE
1. Face amount of Note	$50,000	$100,000
2. Original Obligee	INDEPENDENCE	BEVERLY
3. Obligor	FULLERTON/borrower JITNER/Accommodation Borrower	FULLERTON/ borrower JITNER/ Accommodation Borrower
4. Evidence that FDIC is successor-in-interest to original obligee	No competent evidence the FDIC, in its corporate capacity, is successor to original obligee	No competent evidence the FDIC was appointed BEVERLY's receiver or is BEVERLY's successor
5. FDIC endorsement	From FDIC in its corporate capacity to COMMERCIAL	From FDIC as BEVERLY's receiver to FINANCIAL.

Plaintiffs, as Oklahoma Corporations, sued a California residents, JITNER and FULLERTON, in Federal district court based upon diversity of jurisdiction.

Row 4 of the chart pinpoints the juncture at which JITNER claims error and which is the basis of

this petition.[3]

As developed below, the Ninth Circuit Court of Appeals ("9th Circ.") fashioned a federal common law rule which dispensed with the state law requirement of Cal Com'l Code § 3203 that the FDIC (and those claiming under it) could have rights under the notes only if there is proof of the transaction through which the FDIC acquired the notes. In place of the relevant state law the 9th Circ. fashioned a federal rule of the case that all that was required to recover under the notes was the FDIC's indorsement and JITNER'S concession that he was a payor on the notes. JITNER stands on the following proposition which he urged at both the trial and appellate level: under this Court's holding in O'Melveny & Myers v. FDIC 512 US 79, 114 S. Ct 2048, 129 E. Ed 67 (1994) the federal courts are not free to ignore the relevant state law and in its place fashion a federal rule of decision governing the FDIC's rights in the notes. (512 US 79)

A more familiar and analogues situation illustrates the analysis developed in this petition. (A is JITNER B is INDEPENDENCE and BEVERLY C is the FDIC D is the FDIC Assignees).

- A writes a check on his account to B. C obtains possession if the check without an indorsement from B

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3. The record will show the FDIC issued a disclaimer when it assigned the notes which indicated that it gave no warranties and that the notes might not be collectable.

to C. C then assigns and indorses the check to D. The essence of the problem is that there is no indorsement from B to C.

Under state law D must prove the transaction through which C acquired the check since there was no indorsement from B to C. Cal Com'l Code § 3203.

The 9th Circ. instead of following the relevant California law fashioned its own Federal Common Law rule that if C was the FDIC, D would not have to prove the transaction through which C acquired the note.

This 9th Circ. ruling is in direct conflict with: (1) This Court's ruling in O'Melveny & Myers v. FDIC (1994) 512 US 79 (which reversed a 9th Circ. ruling). (2) FDIC v Houde (1st Circ. 1996) 90 F_3d 600; and, (3) California Commercial Code § 3203.

Both plaintiffs brought and prevailed on summary judgment motions. Both plaintiffs had the same servicing agent for their promissory notes, Commercial Financial Services, Inc. ("SERVICES"). The only evidence proffered in support of their summary judgment motions was declarations by SERVICES employees (hereafter "DECLARATIONS") who declared that they were familiar with the records of the FDICs assignees (COMMERCIAL and FINANCIAL) and that "those records reflect the facts set forth below". What followed was the declarants' conclusions as to what facts would be reflected by the records, including their conclusion that the records would reflect that the FDIC obtained the notes as receiver of the original

payees.[4] The only documents attached to the DECLARATIONS were copies of the notes and the copies of loan documents. None of the DECLARATIONS had attached to them the one document which would reflect the appointment of the FDIC as INDEPENDENCE's and BEVERLY's receiver -- which would prove the transaction through which the FDIC acquired the notes.[5]

JITNER repeatedly objected to the trial court's

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4. A review of the record will show that when plaintiffs filed declarations in connection with various motions the declarants would testify as to their conclusion of what the records reflected. Occasionally those records were attached and they directly contradicted the declarants' conclusions. (Opening Brief Page 14-15 & Fn 7)

5. JITNER inquired of the FDIC what document would prove and reflect the fact that the FDIC acquired promissory notes as the receiver of an insolvent bank. In compliance with Fed Rules of Evid 201, 28 USAC (Evid R 201") he then described the document to the trial court and requested that the court take judicial notice of the required document. Consistant with Evid R 201 JITNER provided the court with the name of the FDIC employee in Washington D.C. who could confirm the information and indicated how the court could easily reach that employee. The court never responded to JITNER's request nor will the record show such a document was ever produced before the court. Yet, summary judgment was granted and affirmed.

consideration of the DECLARATIONS on several grounds: the DECLARATIONS were conclusionary; the DECLARATIONS, without the attached documents, violated the best evidence rule; testimony as to what the documents might reflect violates the hearsay rule; declarants were not percipient witnesses to the substance of their testimony; and, the DECLARATIONS were in violation of Fed Rules Civ. Proc. 56(e), 28 USCA . ("Civ.R.56(e)") in several respects.[6] The trial court, Judge Mariana Pfaelzer presiding, refused to rule on JITNER's objections and relied on the DECLARATIONS when issuing the summary judgment.

At the trial level JITNER relied on this Court's holding in the O'Melveny case, supra, 512 US 79, that if the Federal statutory scheme creating and regulating the FDIC (12 USAC § § 1811-1840) does not directly address a question, then the federal courts must

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6. The Civ R 56(e) rule violations claimed by JITNER to a great extent mirrored his evidentiary objections, such as; (1) the declarations were not based on personal knowledge setting forth facts as would be admissible in evidence, (2) the declarations did not affirmatively show affiant's competency to testify on the matter stated in the affidavits and (3) there were no sworn or certified copies of papers attached to the declarations to which the declarations referred and upon which they relied. The 9th Circ.'s opinion isolated only on the third claimed Rule 56 violation and ignores JITNER's other evidentiary objections. (see nt 7 and accompanying text)

resolve the question by applying relevant state law; they are not free to ignore state law and fashion their own Federal rule of decision to answer the question. He asserted that under California law if (1) a transferee (The FDIC) is in possession of notes which on their face do not show it (The FDIC) as a payee and (2) there is no indorsement on the face of the notes from the payees (INDEPENDENCE AND BEVERLY), then the transferee (the FDIC) does not obtain any rights under the notes unless it is able to prove the transaction through which it acquired the notes (Cal Com'l Code § 3203 and Official Comment (2) thereto) Possession of the note by the FDIC is not sufficient! JITNER pointed out there is no Federal statute cited which addresses whether possession alone of the notes by FDIC, without more, is sufficient for the FDIC to acquire rights under the notes. Thus, under California law before the FDIC (and the assignee who claiming under the FDIC) can obtain rights under the note, there must be proof of the transaction through which the FDIC acquired the notes -- proof that it acquired the notes as receiver of the original payees. JITNER then asserted that because the only evidence proffered in support of the facts necessary for recovery was incompetent evidence to which he had objected, the plaintiffs failed to prove they acquired any rights under the notes. Finally, JITNER pointed the trial court to FDIC v Houde 90 F.3d 600 (1st Cir. 1996) whose facts were remarkable similar to the facts herein.

In Houde the FDIC was seeking to recover on a note in which a bank was the payee and where there was no indorsement to the FDIC. The court held that: (1) under state law the FDIC could recover on the note

only if it met the requirement of proving the transaction through which it acquired the note (2) proof that it was appointed receiver of the bank (payee) would meet this requirement and (3) the proffered testimony of the FDIC's custodian of the records that the records would reflect such appointment was not competent evidence to establish the receivership. The FDIC was, therefore, precluded from recovery under the note.

The trial court herein apparently applied state law to the extent that proof of FDIC's receivership was necessary for recovery. It then found that the FDIC was INDEPENDENCE's and BEVERLY's receiver. It did so (1) inspite of JITNER's objection to consideration of the DECLARATIONS and did so without ruling on his objections and (2) in spite of the holding in the Houde Case and (3) inspite of the fact that the document which would reflect and prove the FDIC's receivership was not before the court (see nt 5 on page 5).

JITNER then appealed to the 9th Circ. In his briefs he: (1) repeated the state requirements of Cal Com'l Code § 3203 and Official Comment 2 thereto; (2) brought to the 9th Circ.'s attention this Court's teaching that the Federal court was not free to fashion a common law principal in derogation of state law and (3) repeated his evidentiary and Civ R 56(e) violation objections upon which the trial court refused to rule.

The 9th Circ. saw no need to deal with JITNER's objections to the consideration of the DECLARATIONS. They referred particularly to JITNER's Rule 56(e)

objections that the DECLARATIONS did not have attached to them certified copies of the documents referred to and relied upon by the declarants, which of course would include the document which would prove and reflect the FDIC's appointment as receiver (see footnote 5 at page 5). It saw no need because it fashioned its own federal rule of the case which dispensed with the state requirement that in order for the FDIC (and those assignees claiming under it) to have rights under the notes there had to be proof of the transaction through which the FDIC acquired the notes. The 9th Circ.'s opinion states at page 20.

"1. Defendant first argues that, under ... [Civ Rule 56(e)], Plaintiffs were required to attach to their affidavits in support of summary judgment all the documents on which they relied. Plaintiffs submitted sufficient documentation to establish their rights to recover on the notes: (a) A copy of the $100,000 note, attached to the McLaughlin affidavit, shows an endorsement to... [Financial] from the FDIC. (b) A copy of the $50,000 note, attached to the Robertson affidavit, shows an endorsement from the FDIC to [Commercial]. Those documents, in conjunction with Defendant's in-court concession that he owes the money, demonstrate Plaintiffs' rights to enforce the notes (emphasis added)."7

Even though the requirements of Cal Com'l Code § 3203 were brought to the 9th Circ's attention, it decided to ignore § 3203 and created its own Federal

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7 See footnote 6 on page 6

court rule which dispensed with the requirement that there be proof of the transaction through which the FDIC acquired the notes. It formulated its own Federal common law rule in direct conflict with this Court's teaching in O'Melveny & Myers case and did so after JITNER brought that teaching to the 9th Circ.'s attention. Not only did the 9th Circ. not follow the O'Melveny & Myers case, it saw no need even to discuss it, inspite of its relevance. It also completely ignored the Houde case upon which JITNER relied. It is this conduct by the 9th Circ. which gives rise to this petition.

IX. STATEMENT OF CASE - REVIEW OF FEDERAL COURT JURISDICTION SOUGHT

The plaintiffs (Respondents) were incorporated under the laws of the State of Oklahoma and their principal places of business is in Oklahoma.

The defendant (Petitioner) is a citizen of the State California.

At the time of filing the matters in controversy, exclusive of interests and costs, exceeded the sum then specified by 28 USC § 1332.

X. ARGUMENT

A. Under This Court's Rule 10 Certiorari Should Be Granted Because the Ninth Circuit Court of Appeal's Opinion Ignores and Directly Conflicts with This Court's Holding in O'Melveny & Myers v FDIC, a Case in Which This Court Reversed a Ninth Circuit Opinion.

Prior to the O'Melveny & Myers case the federal courts constructed a Federal common law surrounding FDIC involved transactions. Federal courts filled in the silences in the Federal statutory scheme with federal rules of decision in derogation of applicable state law. This Court in reversing the 9th Circ. in O'Melveny & Myers reasserted the Erie Doctrine and swept away this federal common law accretion. This Court stated in O'Melveny & Myers v. FDIC 512 US 79, 85, 1145. Ct 2048, 1129 L. Ed 67 (1994) that:

> In answering the central question of displacement of California law, we... would not contradict an explicate federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to disposition provided by state law. (emphasis added)

This Court recognized that in rare cases when there is an identifiable and specific concrete federal policy or interest that is compromised by state law,

then a federal rule of decision may be justified. However this Court found no such policy or interest regarding the particular right of the FDIC as a receiver[8] 512 US at 88-89.

JITNER in both courts below briefed this Court's O'Melveny & Myers teaching which expressly required the federal courts to apply California law as to what the FDIC (and those claiming under it) must do to be able to assert rights under the notes.[9]

The 9th Circ. essentially turned a blind eye to this Court's O'Melveny & Myers teaching and the relevant California law which dictates what rights the FDIC acquires in the notes and passes on to its assignee.[10] It was on this basis the 9th Circ. justified its not addressing JITNER's evidentiary and Rule 56(e) violation objections to the DECLARATIONS.

This Court should not tolerate the 9th Circ.'s selective adherence to Supreme Court holdings. This

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8 This court rejected (1) "uniformity of federal law facilitation and (2) "federal rule of decision might prevent depletion of the insurance fund" both inadequate as such a policy or interest 512 US at 88-89.

9 See page 5 of this petition in which the requirements of California law are set forth. See also Section XI - Appendix - Document 5.

10 The 9th Circ. also ignored the FDIC disclaimer set forth in footnote 3 at page 2.

Court must not allow a lower court to apply the O'Melveney & Myer holding if its result comports with a predetermined outcome and to deliberately ignore it when it does not so compost.[11]

B. Under This Courts Rule 10 Certiorari Should Be Granted to Create Uniformity in All The Circuits

JITNER below briefed the 1st Circuit case FDIC v Houde 90F3d 600 (1st Cir. 1996), a case whose facts are remarkably similar to the instant case but whose outcome was just the opposite.

In Houde, as in the instant case, the FDIC was in possession of a note where the payee on the face of the note was a bank. As in the instant case there was no indorsement from the payee to the FDIC. Unlike the 9th Circ. the 1st Circuit applied the state law which was identical to California law.[12] It recognized that under 12 U.S.C. § 1821 (d) (2) the FDIC as receiver could

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11 A review of the record will reveal that the trial court prejudged the case at the first status conference when it ordered the plaintiff to seek summary judgment (Opening Brief, p.3 at nt. 1) and, it will reveal repeated instances of the courts below ignoring evidence before them, even to the point of having, as a result, to vacate rulings (for example see Opening Brief pages 12-14).

12 The Maine Code provision cited by Houde appear first follow by a slash and the comparable California provisions: 11 M.R.J.A. § 3-12/Cal Com'l Code § 3203; 11 M.R.S.A. § 3-1203 and UCC comment thereto/Cal Comm Code § 3202 and Official comment 2 thereto.

assert rights under the note. The question was whether the FDIC could prove its receivership; only then would the FDIC be in compliance with state law which required proof of the transaction through which the FDIC acquired the note. Only then would the FDIC have enforceable rights under the note! In the instant case the trial court, unlike the 9th Circ., apparently, like Houde found it necessary that there be a factual determination that the FDIC was the receiver. It made such finding and did so on the basis of the DECLARATIONS. The trial Court's reliance on the DECLARATIONS was in direct conflict with the Houde decision.

In Houde the only proffered testimony in support of the proposition that the FDIC came into possession of the notes as receiver was testimony by the FDIC's custodian of the records, one GOLDEN. He testified that the FDIC records would reflect that the FDIC obtained the note as a receiver. In the instant case the trial court relied on the testimony of employees of SERVICES (a servicing company) to testify as to what COMMERCIAL's and FINANCIAL's records would reflect, including that the FDIC was receiver of INDEPENDENCE and BEVERLY.

In Houde the court found that the testimony of the FDIC's Custodian of Records was not competent evidence to establish that the FDIC was the receiver. If the custodian if the actual records of the FDIC could not provide competent testimony, then certainly the testimony of employees of a servicing company for the FDIC's assignees could not provide competent testimony that the FDIC was the receiver.

In Houde, based on evidentiary objections to the GOLDEN testimony, his testimony was struck. Here in the trial court repeatedly ignored JITNER's objections to consideration of the DECLARATIONS by made by SERVICES' employees to the effect that the FDIC's assignees records would reflect that the FDIC was appointed receiver of the banks. Thus, in Houde the FDIC could not recover under the notes because it could not prove the transaction through which it acquired the note -- it could not prove its receivership because of incompetent testimony. In the instant case the FDIC's assignees were allowed to recover based on the trial court's refusal to even consider some of the same evidentiary objections that proved fatal to the FDIC's rights (and consequently to any of its assignees) in the Houde case.

The 9th Circ. ignored JITNER's claim of error based on the trial court's refusal to consider his evidentiary objections. It did so because it set out its own federal rule of decision which ignored this Court's O'Melveny & Myers teaching and the requirement of California law. Its own Federal common law rule dispensed with the need to prove the transaction through which the FDIC acquired the notes. Thus JITNER's evidentiary objections to the lower courts consideration of the DECLARATIONS as competent evidence of the FDIC receivership were rendered irrelevant. This is so because of the 9th Circ's common law rule of the case dispensed with the need to prove the FDIC receivership as mandated by California law.

By accepting certiorari not only can this Court insure that the 9th Circ. does not turned a blind eye to

the Supreme Court's holding in O'Melveny & Myers, but it can insure uniformity among the circuits for fact patterns similar to those herein and in Houde. This Court can make it clear that when the FDIC claims rights under a note as a receiver it must conform to the provisions of the UCC, as adapted by the individual states. If a state adopts the UCC requirement that, absent an indorsement on a note, the transferees under the note only obtain rights under the note if there is proof of the transaction through which it acquired the note, then for the FDIC (and its assignees) to acquire rights under the note that they must comply with this states mandated requirement.

CONCLUSION

This Court in O'Melveny & Myers reversed a 9th Circuit case and announced the legal principal that courts were not free to formulate federal common law regarding the FDIC; any questions unaddressed by the federal statutory scheme must be resolved by the application of state law. In the instant case, that very circuit, the 9th Circuit, chose to deliberately ignore this Court's O'Melveny & Myers teaching. "Deliberately" because this court's ruling was briefed for the 9th Circuit[13]. "Ignored" because the 9th Circuit not only held in direct contradiction with O'Melveny & Myers but it did not even bother to mention the case.

There was no competent evidence before the court that the FDIC acquired the notes as receiver of the original payees. Indeed, the absence of the one

[13] While O'Melveny & Myers appears in all of JITNER'S briefs, its relationship to the 9th circuit's opinion is most clearly set forth in his Petition for Rehearing.

document necessary to prove such receivership[14] may well account for the notes to plaintiffs was accompanied by a disclaimer of any warranties and a disclaimer as to collectability of the notes[15] . When the 9th Circuit dispensed with the requirement of Cal. Comm. Code § 3203 (and Official Comment 2 thereto) in favor of its own federal rule (namely, that there was no need to prove the transaction through which the FDIC acquired the note) it denied this Court's O'Melveny & Myers holding. This Court must grant this Writ to make it clear that all questions unaddressed by the Federal statutory scheme (12 USAC §§ 1811-1840) must be resolved by the application of state law; the courts are not free to formulate their own federal common law in direct violation of the O'Melveny & Myers holding.

The First Circuit's holding in the Houde case comports with the O'Melveny Myers holding without even mentioning the case. It applied state law and denied recovery to the FDIC because the FDIC could not prove (as required by state law the transaction through which it (the FDIC) acquired the note. The 9th Circuit holding is in direct contradiction with Houde.

It is imperative that this Court accept this Petition to prevent the 9th Circuit from deliberately acting contrary to a U.S. Supreme Court ruling and to bring uniformity among the circuits. Thus, Petitioner, JITNER, respectfully requests that the court accept this

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[14] See footnote 5.

[15] See footnote 3. The text of the disclaimers and where they appear in the record are set out in the Opening Brief, page 30, and the Reply Brief at page 4.

Petition for Certiorari and that it remand the matter to the 9th Circuit with instructions that it apply California law (particularly Cal. Comm. Code § 3203 and that it examine the record to determine if there was proof at the trial level of the transaction through which this FDIC acquired the notes.

Respectfully submitted,

WALTER JITNER

Petitioner in Pro Se

XI. APPENDIX

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Filed May 3, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CF/SPC 1994, INC.; COMMERCIAL FINANCIAL/ SPC ACQUISITIONS, INC.; FINANCIAL COLLECTIONS, INC.,	No. 98-56810 D.C. No. CV-96-01877-MRP
Plaintiffs-Appellees,	MEMORANDUM*
v.	
WALTER JITNER,	
Defendant-Appellant.	

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Submitted April 17, 2001**
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Before: PREGERSON, FERNANDEZ, and GRABER, Circuit Judges.

Defendant Walter Jitner appeals the district court's entry of summary judgment in favor of Plaintiffs Commercial Financial and Financial Collections. Plaintiffs, who are assignees of the Federal Deposit Insurance Corporation (FDIC), sued Defendant on two promissory notes. We affirm.

1. Defendant first argues that, under Federal Rule of Civil Procedure 56(e), Plaintiffs were required to attach to their affidavits in support of summary judgment all the documents on which they relied. Plaintiffs submitted sufficient documentation to establish their rights to recover on the noted: (a) A copy of the $100,000 note, attached to the McLaughlin affidavit, shows an endorsement to Financial Collections from the FDIC. (b) A copy of the $50,000 note, attached to the Robertson affidavit, shows an endorsement from the FDIC to Commercial Financial. Those documents, in conjunction with Defendant's in-court concession that he owes the money, demonstrate Plaintiffs' rights to enforce the notes.

2. Defendant next contends that California Commercial Code § 3501 requires Plaintiffs to present him with the original notes as a prerequisite to their enforcement. Section 3504 of the California Commercial Code expressly excuses presentment when, "by the terms of the instrument[,] presentment is not necessary to enforce the obligation," § 3504(a)(3), and when "the drawer ... whose obligation is being enforced has waived presentment," § 3503(a)(4). By the terms of both notes, Defendant has waived any right of presentment.

3. Third, Defendant asserts that there is a genuine issue of material fact as to whether the banks performed all their obligations relating to the two notes, that his

repayment of the loans was conditioned on the banks' performance of those obligations, and that his obligation to repay is excused by the banks' failure to perform. Defendant says that two documents that are separate from the notes impose additional obligations on the banks and that it is disputed whether the banks met those obligations: (a) the "Commitment Letter" and (b) the "Business Loan Agreement."

The Commitment Letter agrees to extend the loan for, at most, a year from the original due date of June 3, 1992, at a higher rate of interest than the rate appearing on the face of the note. Because Plaintiffs did not attempt to collect on the note until March 1996, nearly three years after the loan would have come due had it been extended, Defendant, in effect, already received the extension.

With respect to the Business Loan Agreement, Defendant's argument fails because the document places no obligation upon the lender to renew the loan but, instead, states plainly that "the granting, renewing or extending" of any loan is solely within the discretion of the lender.

In sum, neither document provides Defendant with a defense to his obligations to repay the notes.

4. Next, Defendant argues that the district court abused its discretion by denying his several motions to extend discovery. Defendant had seven months for discovery, and the record does not reflect that his need for more time was caused by hardship. Under the circumstances, the district court did not abuse its discretion by denying Defendant's motions for additional discovery.

5. Finally, Defendant argues that the district court abused its discretion when it denied him the opportunity to file an amended answer in response to Plaintiffs' Second Amended Complaint before the court ruled on Plaintiffs'

motion for summary judgment. Because the second amended complaint is almost identical to the initial complaint, the district court did not abuse its discretion.

AFFIRMED.

Filed December 10, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CF/SPC 1994, INC.; COMMERCIAL FINANCIAL/ SPC ACQUISITIONS, INC.; FINANCIAL COLLECTIONS, INC.	No. 98-56810
Plaintiffs-Appellants,	D.C. No. CV-96-01877-MRP
v.	ORDER
WALTER JITNER,	
Defendant-Appellant.	

Before: PREGERSON, FERNANDEZ, and GRABER, Circuit Judges.

Appellant's late petition for rehearing tendered May 25, 2001, is ordered filed.

Appellant's petition for rehearing is DENIED.

Filed January 2, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-56810
CT/AG#: CV-96-01877-MRP

COMMERCIAL FINANCIAL/
SPC ACQUISITIONS INC.

Plaintiff-Appellee

v.

WALTER JITNER.

Defendant-Appellant

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered May 3, 2001

Filed December 22, 1999

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COMMERCIAL FINANCIAL/ SPC ACQUISITIONS, INC., and FINANCIAL COLLECTIONS, INC.,

Case No. CV-96-01877-MRP

Plaintiffs,

v

CORRECTED JUDGMENT

WALTER JITNER, an individual, PETER S. FULLERTON, an individual,

Defendants.

The Court has reviewed all papers filed in connection with the Motion by Plaintiffs COMMERCIAL FINANCIAL/SPC ACQUISITIONS, INC. ("COMMERCIAL") and FINANCIAL COLLECTIONS, INC. ('FINANCIAL") for correction of the Judgment filed herein on September 10, 1998, and said motion has been considered and granted. Pursuant thereto, the Court ordered the correction of the Judgment as appropriate based upon the granting of the two motions for summary judgment in favor of the above Plaintiffs.

Therefore, the Court corrects said filed Judgment as follows:

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Judgment is awarded to Plaintiff Commercial Financial/SPC Acquisitions, Inc. and against Defendants

Walter Jitner and Peter Fullerton jointly and severally, in the following amounts:

Principal	$50,000.00
Interest due as of 7/27/98 (plus interest due from 7/28/98 to date, costs, & reasonable attorney fees to be fixed by the Court)	17,450.00

2. Judgment is awarded to Plaintiff Financial Collections, Inc. and against Defendants Walter Jitner and Peter Fullerton jointly and severally, in the following amounts:

Principal	$100,000.00
Interest due as of 7/17/98 (plus, interest due from 7/28/98 to date, costs, & reasonable attorney fees to be fixed by the Court)	34,900.22

3. The clerk is ordered to enter this Corrected Judgment forthwith.

DATED: December 22, 1999 /s/Mariana R. Pfaelzer
Honorable Mariana R. Pfaelzer
United States District Judge

Maine Commercial Code Statute

11 MRSA § 3-1203
(UCC Comment 2)

Maine Uniform Commercial Code 11 MRSA § 3-1203

(1) An instrument is transferred when it is delivered by a person other than it's issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(2) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee can not acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(3) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(4) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under the Article and has only the rights of a partial assignee.

UCC Comment 2

Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the

transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 8-308 that the transferee by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.

California Commercial Code § 3203 and Official Comment 2 Thereto

Cal Coml Code § 3203

(a) An instrument is transferred when it is delivered by a person other than it's issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee can not acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under the Article and has only the rights of a partial assignee.

Official Comment 2 thereto

Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 8-308 that the transferee by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.

O'Melveney & Myers v FDIC
(1994) 512 US 79

Pages 85, 86 and 88 are attached

We turn, then, to the more substantial basis for the decision below, which asserts federal pre-emption not over the law of imputation generally, but only over its application to the FDIC suing as receiver. Respondent begins its defense of this principle by quoting *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 726 (1979), to the effect that "federal law governs questions involving the rights of the United States arising under nationwide federal programs." But the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of ADSB. In any event, knowing whether "federal law governs" in the *Kimbell Foods* sense—a sense which includes federal adoption of state-law rules, see *id.*, at 727–729—does not much advance the ball. The issue in the present case is whether the California rule of decision is to be applied to the issue of imputation or displaced, and if it *is* applied it is of only theoretical interest whether the basis for that application is California's own sovereign power or federal adoption of California's disposition. See *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 507, n. 3 (1988).

In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law. See *Northwest Airlines, Inc.* v. *Trans-*

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Section 1821(d)(2)(A)(i), which is part of a title captioned "Powers and duties of [the FDIC] as . . . receiver," states that "the [FDIC] shall, . . . by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution . . . ." 12 U. S. C. § 1821(d)(2)(A)(i) (1988 ed., Supp. IV). This language appears to indicate that the FDIC as receiver "steps into the shoes" of the failed S&L, cf. *Coit Independence Joint Venture* v. *FSLIC*, 489 U. S. 561, 585 (1989), obtaining the rights "*of* the insured depository institution" that existed prior to receivership. Thereafter, in litigation by the FDIC asserting the claims *of* the S&L—in this case California tort claims potentially defeasible by a showing that the S&L's officers had knowledge—"'any defense good against the original party is good against the receiver.'" 969 F. 2d, at 751 (quoting *Allen* v. *Ramsay*, 179 Cal. App. 2d 843, 854, 4 Cal. Rptr. 575, 583 (1960)).

Respondent argues that § 1821(d)(2)(A)(i) should be read as a *nonexclusive* grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law; and that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the courts' authority to promulgate such common law. This argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver. See 12 U. S. C. § 1821(d)(14) (1988 ed., Supp. IV) (extending statute of limi-

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Boyle, supra, at 508. What is fatal to respondent's position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred. Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common-law" rules. See *United States* v. *Yazell*, 382 U. S. 341, 347, n. 13 (1966).

The closest respondent comes to identifying a specific, concrete federal policy or interest that is compromised by California law is its contention that state rules regarding the imputation of knowledge might "deplet[e] the deposit insurance fund," Brief for Respondent 32. But neither FIRREA nor the prior law sets forth any anticipated level for the fund, so what respondent must mean by "depletion" is simply the forgoing of *any* money which, under any *conceivable* legal rules, might accrue to the fund. That is a broad principle indeed, which would support not just elimination of the defense at issue here, but judicial creation of new, "federal-common-law" causes of action to enrich the fund. Of course we have no authority to do that, because there is no federal policy that the fund should always win. Our cases have previously rejected "more money" arguments remarkably similar to the one made here. See *Kimbell Foods, supra*, at

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BEST AVAILABLE COPY

FDIC v Houde
(1st Cir 1996) 90 F3d 600

FDIC v Houde (1st Cir 1996)
90 F3d 600

Excerpts from Page 604 and 605.

"The Houdes reply that the FDIC never presented competent proof of the various transactions through which it allegedly acquired lawful ownership and possession of the Note, Golden's testimony having, in their view, been rightly stricken as hearsay. They argue that without such competent evidence, the FDIC's case failed as a matter of law.

The district court dismissed the case because it concluded that the FDIC had failed to meet its burden of presenting sufficient evidence to establish, prima facie, that it was a party entitled to enforce the Note. Without proper proof of ownership, the Note would not be admissible as a basis for the FDIC's claim. The question, of course, would not be whether the FDIC's right to enforce the Note was conclusively established but whether enough of a case was made out to go to the jury. See Fed.R.Civ.P (50(a) ("If... there is no legally sufficient evidentiary basis for a reasonable jury to find for (a) party on (an) issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party.").

1. The FDIC's Burden of Proof

(1) The FDIC argues that possession of the Note was a sufficient basis

for it to be entitled to a presumption that it could enforce the Note. The FDIC points to federal law, set forth in FIRREA, providing expressly that the FDIC succeeds by operation of law to a failed bank's right and title in all of its assets. .....

(2,3) The applicable Maine law, set forth in the Maine Uniform Commercial Code, Negotiable Instruments, 11 M.R.S.A. 3-1101 et seq.,[3] provides that a note qualifying as a negotiable instrument can be enforced by "holder(s)" and "nonholder(s) in possession of the instrument who (have) the rights of holder(s)." See 11 M.R.S.A. § 3-1301.[4] The FDIC is plainly not a "holder" under Maine law because the Note was not indorsed to the FDIC and therefore was not "negotiated".[5] See 11 M.R.S.A. § 3-1201 ("[I]f an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder.");[5] see also Calaska Partners Ltd. v Carson, 672 A.2d 1099, 1104 (Me.11996) (holding that holder in due course status is not conferred when financial instruments are transferred in bulk to the FDIC). (emphasis added)

(4) Not being a holder, the FDIC had to show, as a prerequisite to enforcing the Note against the Houdes, that it was a transferee in possession entitled to the rights of a holder. See 11 M.R.S.A. § 3-1203. Comment 2 following § 3-1203 provides:

If the transferee is not a holder because the transferor did not indorse, the transferee is

nevertheless a person entitled to enforce the instrument ... if the transferor was a holder at the time of transfer.... Because the transferee is not a holder, there is no presumption ... that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee by a holder is proof that the transferee has acquired the rights of a holder. At that point the transferee is entitled to the presumption.... (emphasis added).[7] Thus, in order minimally to be entitled to the presumption under Maine law that it could enforce the Note, the FDIC was required (1) to prove a sufficient transfer from a holder (here MNB, to which the note was made payable by the Houdes) to the FDIC in its present capacity as receiver of NMNB, and (2) to produce the Note at trial." (emphasis added)

Excerpt from Page 607

"(8) Attempting to justify the lack of admissible foundation evidence, the FDIC now argues that because the Note was never indorsed and never made payable to anyone other than MNB, it plainly could not have been sold to a third party by the FDIC or the bridge bank. But while the absence of an indorsement on the Note strengthens the argument that no one acquired a title superior to that of the FDIC, it does not by itself meet the FDIC's burden to 'account

for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.' 11 M.R.S.A. § 3-1203, Comment 2, supra."

Supreme Court, U.S.
FILED
APR 18 2002
OFFICE OF THE CLERK

No. 01-1364

In The

Supreme Court of the United States

WALTER JITNER,

Petitioner,

v.

COMMERCIAL FINANCIAL/SPC ACQUISITIONS, INC.; FINANCIAL COLLECTIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The U.S. Ninth Circuit Court Of Appeals

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Answering parties Commercial Financial/SPC Acquisitions, Inc. and Financial Collections, Inc. (hereinafter collectively "Commercial") respectfully submit that the questions here should properly be:

1. Did the Ninth Circuit err in its application of California and Federal law to decide that promissory notes which were part of the assets of a failed bank taken over by the Federal Deposit Insurance Corporation ("FDIC") as receiver, and thereafter sold and assigned to Commercial in the secondary market, were admissible?

2. When the FDIC takes over a failed bank and its assets, is any endorsement required as to notes thereby acquired in order for the FDIC to obtain title, or does the FDIC acquire full title pursuant to express federal law?

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I.

RELEVANT FACTS

The only facts essential to determination of this are not in dispute. A bank that held notes reflecting a debt owed by Petitioner Walter Jitner ("Jitner") failed, and the FDIC took over that bank and acquired its assets. The FDIC thereby possessed the notes given by Jitner to the bank. Thereafter, the FDIC assigned the notes to Commercial. The notes contained allonges from the FDIC to Commercial, and the Commercial custodian of records testified that the notes were indeed obtained from the FDIC.

No evidence was introduced to show any negotiation of the notes from the failed bank to the FDIC. The Commercial custodian could not testify as to how the FDIC got the notes.

II.

SUMMARY OF ARGUMENT

The Ninth Circuit did not create or rely on any "federal common law", and correctly relied on Federal statutory law and on California statutory law in reaching its decision.

The statutory and case law relied on by Jitner is inapplicable and incorrectly applied to his arguments. The case herein is easily distinguishable from *O'Melveny & Myers v. FDIC* 512 U.S. 29, 114 S.Ct 2048, 129 L.Ed.2d 67 (1994) cited by Jitner and discussed herein, and California's *Commercial Code* § 3203 is irrelevant to the facts herein.

No evidence of negotiation to the FDIC is required to establish the FDIC's title to, and right to assign, the notes.

III.

ARGUMENT

A. The ruling of the Court of Appeals was based on Federal statutory law, not "federal common law".

12 U.S.C. § 1821(d)(2)(A) states in pertinent part:

> The Corporation shall, as conservator or receiver, and by operation of law, succeed to –
>
> > (ii) title to the books, records and assets of any previous conservator or other legal custodian of such institution. *Id.*

The court, in *Resolution Trust Corp. v. S & K Chevrolet Co.* 923 F.Supp. 135 (C.D.Ill 1996), held that the transfer of assets from a failed savings and loan to the Resolution Trust Corporation was accomplished *by operation of federal law*, and thus the RTC was receiving the assets under the express federal statute, not by assignment under state contract law.

In the case herein, clearly federal law provides that no endorsement is required for the FDIC to own the subject Jitner notes without the endorsement required by California *Commercial Code* § 3203. The Court of Appeals did not create "federal common law" to ignore California state law, it utilized federal *statutory* law which pre-empted the state law.

12 U.S.C. § 1820(f) states in pertinent part:

> Such . . . copies [of bank records] shall be deemed the original for all purposes, including introduction as evidence in all state and federal courts or administrative agencies and shall be admissible to prove any act, transaction, occurrence, or event therein recorded. *Id.*

It is not required of Commercial that it produce the original notes in order to pursue collection litigation, or produce "sworn or certified copies" as Jitner argues. Even in non-FDIC cases, federal evidentiary law gives wide latitude as to introduction of records prepared by another. In *Miss. River Grain Elevator, Inc. v. Bartlett & Co. Grain*, 659 F.2d 1314 (1981 CA 5 La), the court stated at page 1319 the following principle, which also has been set forth in almost every other federal district:

> [Federal Evidence] Rule 803(6) does **not** (sic) require that the records be prepared by the business that has custody of them. Where circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation. The issue of admissibility under Rule 803(6) is chiefly a matter of trustworthiness. In this inquiry the trial court is given great latitude.

See also United States v. Veytia-Bravo 603 F.2d 1187 (5th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980); *United States v. Hathaway* 798 F.2d 902 (6th Cir. 1986); *Saks Int'l Inc. v. M/V "Export Champion"* 817 F.2d 1011, 1013 (2nd Cir. 1987) (documents may properly be admitted under this Rule as business records even though they are the records of a business entity other than one of the parties"); *Munoz*

v. Strahm Farms, Inc. 69 F.3d 501, 503 (Fed. Cir. 1995) ("it is of no consequence that the records are created by another entity, as long as the other requirements of Rule 803(6) are met").

The 9th Circuit, in *U.S. v. Childs* 5 F.3d 1328 (9th Cir. 1993), discussed a number of situations where a party who was the present custodian, but who was not present when the documents were initially prepared or part of the organization that prepared them, could still offer admissible exhibits. The *Childs* court set forth the rule that: "Under Federal Rules of Evidence, documents may provide their own authentication or the necessary foundation may be established by extrinsic evidence." *Id.* at 1336.

The Commercial custodians of record testified that the two notes which were assigned to Commercial, were received from the FDIC. The FDIC put its allonge on the two Notes. These declarations meet the requirements of Rule 803(6) and the interpretation thereof.

When the above principles are applied to an FDIC-related case, they only reinforce the Congressional intent that the bank documents taken over by the FDIC speak for themselves as to authenticity and admissibility (certainly Congress intended the presumption that the FDIC would not tamper with them). Therefore it seems clear that no further foundation is necessary other than a declaration from the custodian of records of the assignee of the FDIC, that the records were received in a packet from the FDIC.

B. *O'Melveny & Myers v. FDIC* is not applicable to the facts herein.

Jitner's reliance on the case of *O'Melveny & Myers v. FDIC* 512 U.S. 29, 114 S.Ct 2048, 129 L.Ed.2d 67 (1994), for the proposition that there is no Federal law covering the case herein, is misplaced. Justice Scalia, in his opinion in *O'Melveny*, sets forth as the issue therein whether Federal (FDIC) law or a state rule of decision governs the **tort liability** of attorneys who provided services to a failed bank.

The *O'Melveny* opinion discussed the fact that there was no federal common law as to the **tort** involved, and that 12 U.S.C. §§ 1821 and 1823 ("FIRREA") did not expressly provide any law on this subject. Therefore, the opinion held California tort law controlled, and a federal court could not provide its own "common law" rule.

However, nowhere in the *O'Melveny* opinion did the Supreme Court limit the role of a federal court in *interpreting* federal statutes or the intent of Congress in relation thereto. In other words, where the federal statute covers the subject, the federal courts do not go out of business as to the necessary role of interpreting and applying the statute. *Id.* at 86.

Furthermore, the *O'Melveny* opinion specifically noted areas of law wherein FIRREA expressly preempted state law and therefore specifically controlled: the six year statute of limitations and the barring of claims and defenses against the FDIC based on alleged unrecorded agreements by the failed bank. *Id.* at 86.

The *O'Melveny* opinion pointed out that whenever there was conflict between the federal statute and state law, the former prevailed. *Id.* at 86. It is only where the statute is completely silent on the subject that state law is used rather than a federal court "filling the void" with federal "common law". *Id.* at 87.

Jitner has ignored the fact that express portions of the Federal statutes cover the issues herein, and no "common law" is required to fill any gap in Federal statutory law.

C. The *FDIC v. Houde* opinion does not require that the 9th Circuit opinion herein be accused of creating "federal common law".

FDIC v. Houde 90 F.3d 600 (1st Cir. 1996), dealt with whether the FDIC became a holder in due course upon taking over the assets of a failed bank, and held that under Maine law, the mere acquisition by the FDIC of notes from a failed bank did not qualify as a negotiation because there was no endorsement. *Id.* at 605.

Commercial herein has never argued (nor did the District Court or 9th Circuit opine) that there was a negotiation of the Jitner notes from the failed bank to the FDIC, or that the FDIC was a holder in due course. The FDIC merely took title *pursuant to federal statute*, and then transferred this title to Commercial by assignment.

The *Houde* court apparently pounced on a Code comment as requiring "proof of the 'transaction' as to how the transferee acquired a note", to require the FDIC to prove there was a transaction by which it got the Houde

note (there is no such requirement in the California statute itself).

Of course there is no transaction when the FDIC takes over a failed bank. By the express wording of 12 U.S.C. § 1821(d)(2)(A) the FDIC succeeds to the rights, titles and powers of a failed bank. Therefore the FDIC becomes one and the same as the failed bank, and *automatically* becomes the owner of assets such as the Jitner notes without any transaction or transfer.

The federal court sitting in Maine would apparently assume that 12 U.S.C. § 1821(d)(2)(A) does not mean what it says. For the California district court and the 9th Circuit to logically interpret the express wording in that statute to clearly mean that the FDIC obtained lawful title to the Jitner notes as part of the assets it *automatically acquired* from the failed bank, is not creating federal common law, nor does it contradict California law as is discussed below.

D. Jitner has misstated the application of California Commercial Code § 3203.

Jitner mistates the import of the California *Commercial Code* § 3203. This code section merely sets apart the rights of a holder in due course on commercial paper from those of an assignee of a debt such as evidenced by a note.

California *Commercial Code* § 3203(b), cited by Jitner on page A-13 of his Appendix, states in pertinent part

that "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument. . . . ".

California courts have held " . . . that section [that endorsement must be an endorsement of the entire instrument] relates **solely** [emphasis in original] to negotiation of commercial paper [citation omitted] and not to an assignment of an interest in a note." *D'Orazi v. Bank of Canton* (App. 5 Dist. 1967) 254 Cal.App.2d 901, 904, 62 Cal.Rptr 704.

Furthermore, it is unquestioned that " . . . a bank which takes an item for collection . . . need not establish that it took the item by negotiation in order to satisfy [the provisions of the commercial code] . . . transfer of an instrument vests in the transferee all the rights of the transferor." *Security Pacific National Bank v. Chess* (App. 2 Dist 1976) 58 Cal.App.3d 555, 565, 129 Cal.Rptr. 852.

In *White v. Moriarty* (1993) 15 Cal.App.4th 1290, 19 Cal.Rptr.2d 200, the Court held, in a case wherein the California Court specifically replaced state law as to the statute of limitations with Federal law, that proof was not even required that the holder of a note establish that he received it from the FDIC. In response to the claim of the debtor, Moriarty, that there was no evidence that White acquired the subject note from the FDIC, the Court stated in Footnote 2:

> A person in possession of an instrument endorsed to him is the holder of the instrument. (Cal. Com. Code § 1201, subd. (20).) Signatures are presumed genuine in the absence of contrary evidence. (Cal. Com. Code, former § 3307, subd. (1)(b).). Furthermore, an obligation possessed by

> a creditor is presumed unpaid. (Evid. Code § 635; Cal. Comm. Code, former § 3307, subd. (2).) In the absence of any contrary evidence, the endorsements on the promissory note constituted substantial evidence of White's status as holder of the note. *Id.* at 1296.

12 U.S.C. § 1821(d)(2)(A) specifically created the FDIC's ownership of the Jitner notes without any transaction or transfer from the failed bank to the FDIC. The FDIC then had the right to enforce the Jitner notes pursuant to the California statute. The evidence is clear that the FDIC transferred the notes to Commercial.

The decision upholding Commercial's right to enforce the notes against Jitner is fully covered by the appropriate state and federal statutory law, and neither the district court nor the 9th Circuit created any federal common law.

IV.

CONCLUSION

For the above reasons, Commercial respectfully submits that Jitner's argument that the *O'Melveny* case has been ignored by the Ninth Circuit is unfounded. The Ninth Circuit opinion herein was not based on any "federal common law", but rather was soundly based on the federal statute to the extent it superseded state law, and otherwise on state law.

Jitner's Petition for the writ should be denied.

Respectfully submitted,

DAVID J. WUKITSCH
TEMPLETON BRIGGS

Attorneys for Respondents Commercial Financial/SPC Acquisitions, Inc. and Financial Collections, Inc.

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12 U.S.C. § 1820

* * *

(f) Preservation of records by photography; admissibility as evidence

The Corporation may cause any and all records, papers, or documents kept by it or in its possession or custody to be photographed or microphotographed or otherwise reproduced upon film, which photographic film shall comply with the minimum standards of quality approved for permanent photographic records by the National Institute of Standards and Technology. Such photographs, microphotographs, or photographic film or copies thereof shall be deemed to be an original record for all purposes, including introduction in evidence in all State and Federal courts or administrative agencies and shall be admissible to prove any act, transaction, occurrence, or event therein recorded. Such photographs, microphotographs, or reproduction shall be preserved in such manner as the Board of Directors of the Corporation shall prescribe and the original records, papers, or documents may be destroyed or otherwise disposed of as the Board shall direct.

* * *

12 U.S.C. § 1821

* * *

(d) Powers and duties of Corporation as conservator or receiver

* * *

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to –

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

* * *

USCS Fed Rules Evid R 803 (2002)

Rule 803. Hearsay Exceptions;
Availability of Declarant Immaterial

* * *

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * *

California Commercial Code § 1201

* * *

(20) "Holder," with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder," with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

* * *

California Commercial Code § 3308. Signatures; validity; presumptions and proof

* * *

(b) If the validity of signatures is admitted or proved and there is compliance with subdivision (a), a plaintiff producing the instrument is entitled to payment if the plaintiff proves entit~~lement~~ to enforce the instrument under Section 3301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

California Evidence Code § 635. Obligation possessed by creditor

An obligation possessed by the creditor is presumed not to have been paid.

*659 F.2d 1314, *; 1981 U.S. App. LEXIS 16598, **;*
9 Fed. R. Evid. Serv. (Callaghan) 336;
32 Fed. R. Serv. 2d (Callaghan) 1095

MISSISSIPPI RIVER GRAIN ELEVATOR, INC. and Inter Financing Exchange, S.A., Plaintiffs-Appellants Cross Appellees, Ferruzzi, S.P.A., Counter Defendant-Appellant, Cross Appellee, v. BARTLETT & COMPANY, GRAIN, Defendant-Counter Plaintiff-Appellee Cross Appellant.

No. 80-3344

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT. N*

* FORMER FIFTH CIRCUIT CASE, SECTION 9(1) OF PUBLIC LAW 96-452 OCTOBER 14, 1980.

October 26, 1981

* * *

Fed.R.Evid. 803(6) provides that the following is not excluded by the hearsay rule:

A . . . report . . . of . . . events . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum report, record, or data compilation . . . unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness.

* * *

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*69 F.3d 501, *; 1995 U.S. App. LEXIS 29840, **; 36 U.S.P.Q.2D (BNA) 1499; 43 Fed. R. Evid. Serv. (Callaghan) 221*

MIGUEL A. MUNOZ, Plaintiff-Appellant, v. STRAHM FARMS, INC., FERNANDO FLORES, E. SCHAFFNER PACKAGING CO., SCHAFFNER FARMS, JIMMY CASTRO, SAMCO PACKING & EQUIPMENT, INC. and VALLEY HARVESTING & PACKING, INC., Defendants-Appellees.

95-1036

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

October 24, 1995, Decided

* * *

Reliability is the basis for admitting evidence under the business records exception. *See Saks Int'l, Inc. v. M/V "Export Champion"*, 817 F.2d 1011, 1013 (2d Cir. 1987). It was not unreasonable for the district court to conclude that Mayberry's testimony provided sufficient indicia of reliability. In addition to having a regular practice of sending film to Kodak for processing and checking the dates of the developed slides, he testified that he had several thousand slides and had never known Kodak to place an incorrect date on a slide. It is of no consequence that Mayberry himself did not develop the slides or place the dates on the slide frames, since a "custodian" under the business records exception need not be the person who created the records. *See United States v. Basey*, 613 F.2d 198, 201 n.1 (9th Cir. 1979) ("It is unimportant under Fed. R. Evid. 803(6) that the custodian did not herself record the information or know who recorded the information."), cert. denied, 446 U.S. 919, 100 S. Ct. 1854, 64 L. Ed. 2d 274 (1980); *see also Saks Int'l*, 817 F.2d at 1013 (a

regular practice of receiving information from another person obviates the need to identify that person). Therefore, we conclude that the district court did not abuse its discretion in admitting into evidence Mayberry's testimony and dated slide frames.

Even assuming that the district court erred in admitting the challenged evidence, such error would have been harmless. The correction of an error must yield a different result in order for that error to have been harmful and thus prejudice a substantial right of a party. *See Cable Elec. Prods., Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1021, 226 U.S.P.Q. (BNA) 881, 884 (Fed. Cir. 1985).

* * *

*512 U.S. 79, *; 114 S. Ct. 2048, **;*
*129 L. Ed. 2d 67, ***; 1994 U.S. LEXIS 4446*
O'MELVENEY & MYERS, PETITIONER v. FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR AMERICAN DIVERSIFIED SAVINGS BANK ET AL.
No. 93-489
SUPREME COURT OF THE UNITED STATES

March 21, 1994, Argued
June 13, 1994, Decided

* * *

[***HR5A] Ed. 2d 442, 108 S. Ct. 2510 (1988).

In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 319, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1981). Petitioner asserts that both these principles apply in the present case, by reason of 12 U.S.C. § 1821(d)(2)(A)(i) (1988 ed., Supp. IV), and the comprehensive legislation of which it is a part, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, 103 Stat. 183.

Section 1821(d)(2)(A)(i), which is part of a title captioned "Powers and duties of [the FDIC] as . . . receiver," states that "the [FDIC] shall, . . . by operation of law, succeed to – all rights, titles, powers, and privileges of the insured depository institution. . . . " 412 U.S.C. § 1821(d)(2)(A)(i)

(1988 ed., Supp. IV). This language appears to indicate that the FDIC as receiver "steps into the shoes" of the failed S&L, cf. *Coit Independent Joint Venture v. FSLIC*, 489 U.S. 561, 585, 103 L. Ed. 2d 602, 109 S. Ct. 1361 (1989), obtaining the rights "*of* the insured depository institution" that existed prior to receivership. Thereafter, in litigation by the FDIC asserting the claims *of* the S&L – in this case California tort claims potentially defeasible by a showing that the S&L's officers had knowledge – " 'any defense good against the original party is good against the receiver.' " 969 F.2d at 751 (quoting *Allen v. Ramsay*, 179 Cal. App. 2d 843, 854, 4 Cal. Rptr. 575, 583 (1960)).

Respondent argues that § 1821(d)(2)(A)(i) should be read as a *nonexclusive* grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law; and that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the courts' authority to promulgate such common law. This argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver. *See* 12 U.S.C. § 1821(d)(14) (1988 ed., Supp. IV) (extending statute of limitations beyond period that might exist under state law); §§ 1821(e)(1), (3) (precluding state-law claims against the FDIC under certain contracts it is authorized to repudiate); § 1821(k) (permitting claims against directors and officers for gross negligence, regardless of whether state law would require greater culpability); § 1821(d)(9) (excluding certain state-law claims against FDIC based on oral agreements by the S&L). *Inclusio unius, exclusio alterius.* It is hard to avoid

the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.

* * *

* * *

Reiman now wishes to clarify that he did not mean to imply that Security or Security Federal were dissolved corporations at the time of receivership. Reiman avers that he has no idea whether they were dissolved or not, and the Complaint does not make this clear. Based on these new facts, the Court hereby vacates that portion of its earlier opinion which dismissed Plaintiff's punitive damages claim in Count I. Upon reconsideration, the Court finds that that issue is best resolved by a motion for summary judgment where additional facts beyond those of the Complaint can be proffered. Only if Security or Security Federal was dissolved prior to RTC's receivership can Reiman claim that Illinois law on punitive damages controls.

To the extent that Reiman is arguing that Illinois law should control regardless of whether Security or Security Federal were dissolved prior to RTC's receivership, the

Court rejects this argument. As the district court held in *Resolution Trust Corp. v. Liebert*, 871 F. Supp. 370, 373 (C.D. Cal. 1994), the mere prohibition of an assignment under state law does not affect RTC's rights to receivership under FIRREA § 1821(d)(2)(A)(i). RTC is receiving the corporation by operation of federal law, not having it assigned under state contract law. *See FTC v. S & K Chevrolet*, 868 F. Supp. 1047, 1053 (C.D. Ill. 1994) ("Contrary to Reiman's argument, it is clear that transfer of assets from Security to Security Federal and from Security Federal to the FTC were accomplished by operation of law."). Reiman's argument concerning contractual assignment of claims continues to ring hollow.

* * *

*817 F.2d 1011, *; 1987 U.S. App. LEXIS 5984, **; 1987 AMC 1899*

Saks International, Inc., Plaintiff-Appellee, v. M/V "Export Champion," her engines, boilers, etc., and Farrell Lines, Inc., Defendants, Third-Party Plaintiffs-Appellees, Cross-Appellants, Maher Terminals, Inc., Third Party Defendant-Appellant, Cross-Appellee

Nos. 86-7998, 86-9034

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

The principal precondition to admission of documents as business records pursuant to Fed. R. Evid. 803(6) is that the records have sufficient indicia of trustworthiness to be considered reliable. *See United States v. Mendel*, 746 F.2d 155, 166 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213, 84 L. Ed. 2d 331, 105 S. Ct. 1184 (1985); *United States v. Lavin*, 480 F.2d 657, 662 (2d Cir. 1973). Documents may properly be admitted under this Rule as business records even though they are the records of a business entity other than one of the parties, *see United States v. Consolidated Edison Co.*, 580 F.2d 1122, 1131 n.18 (2d Cir. 1978), and even though the foundation for the receipt is laid by a witness who is not an employee of the entity that owns and prepared them, *see United States v. Mendel*, 746 F2d at 166; *United States v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986). Further, there is no requirement that the person whose first-hand knowledge was the basis of the entry be identified, so long as it was the business entity's regular practice to get information from such a person. *See United States v. Atchley*, 699 F.2d 1055, 1059 (11th Cir. 1983); *United States v. Basey*, 613 F.2d 198, 201 n.1 (9th Cir. 1979), *cert. denied*, 446 U.S. 919, 100 S. Ct. 1854, 64 L. Ed. 2d 274

(1980). The determination of whether, in all the circumstances, the records have sufficient reliability to warrant their receipt in evidence is left to the sound discretion of the trial judge. *United States v. Lavin*, 480 F.2d at 662.

* * *

*5 F.3d 1328, *; 1993 U.S. App. LEXIS 24742, **;*
37 Fed. R. Evid. Serv. (Callaghan) 1344;
93 Cal. Daily Op. Service 7242
UNITED STATES OF AMERICA, Plaintiff-Appellee, v.
CRAIG LEE CHILDS, Defendant-Appellant.
No. 92-10645
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

July 12, 1993, Argued, Submitted,
San Francisco, California
September 28, 1993, Filed

* * *

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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*798 F.2d 902, *; 1986 U.S. App. LEXIS 28835, **;*
21 Fed. R. Evid. Serv. (Callaghan) 436
UNITED STATES OF AMERICA, Plaintiff-Appellee, v.
JAMES HARRISON HATHAWAY, Defendant-Appellant
No. 85-1520
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * *

1. *Admissibility Under Rule 803(6)*

Defendant's attack on the district court's conclusion is twofold. First, defendant points out that in order to lay the requisite foundation for the evidence to be admissible under Rule 803(6), the government relied in part on the testimony of an FBI agent. Defendant asserts that the use of this testimony was impermissible because the agent was "not . . . the proper custodian of the record as contemplated by Rule 803(6)." To support his argument, defendant relies heavily on *Calhoun v. Baylor*, 646 F.2d 1158 (6th Cir. 1981), where, in affirming the district court's exclusion of evidence, we stated: "Rule 803(6) is inapplicable because the witness . . . played no role in the creation of compilation of the records and was therefore in no position to attest to their reliability." 646 F.2d at 1162. From that, defendant argues that in this circuit only those individuals who play a role in the creation or compilation of records can be used to lay the requisite foundation under Rule 803(6). While this argument is not without some appeal, we are unable to accept it.

To accept defendant's interpretation of the passing statement in *Calhoun* would put this circuit at odds with every other circuit and commentator known by this court to have addressed the issue. Similarly, for us to have held in

Calhoun that only those who play a role in the creation or compilation of records can testify to lay the foundation would have required us to overrule our earlier holding in *United States v. Reese*, 568 F.2d 1246 (6th Cir. 1977). In *Reese*, the authenticating witness did not have control over or a personal knowledge of the evidence contained in the record at issue. Nevertheless, we held that the records in question were admissible since the employee had "knowledge of the [business'] regular practices." 568 F.2d at 1252. *See also United States v. Wables*, 731 F.2d 440, 449 (7th Cir. 1984) (citing *Reese* to support the holding that "the witness [used to lay the foundation] need only have knowledge of the procedures under which the records were created.").

Thus, contrary to defendant's argument, there is no reason why a proper foundation for application of Rule 803(6) cannot be laid, in part or in whole, by the testimony of a government agent or other person outside the organization whose records are sought to be admitted. When a witness is used to lay the foundation for admitting records under Rule 803(6), all that is required is that the witness be familiar with the record keeping system. *See Wallace Motor Sales, Inc. v. American Motors Sales Corp.*, 780 F.2d 1049, 1061 (1st Cir. 1985); *Wables*, 731 F.2d at 449; *NLRB v. First Termite Control Co.*, 646 F.2d 424, 427 (9th Cir. 1981); *Elizarraras v. Bank of El Paso*, 631 F.2d 366 (5th Cir. 1980); *Reese*, 568 F.2d at 1252; 4 J. Weinstein & M. Berger, Weinstein's Evidence, para. 803(6)[02], at 803-178 (1985) ("The phrase 'other qualified witness' should be given the broadest interpretation; he need not be an employee of the entity so long as he understands the system.").

In urging that the district court erred, defendant's second argument is that the records should not have been admitted because they were untrustworthy and inaccurate. Rule 803(6) expressly provides that evidence otherwise admissible under Rule 803(6) is to be excluded if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." On the issue of trustworthiness, as with other evidentiary holdings, "the trial court is given great latitude." *Mississippi River Grain Elevator, Inc. v. Bartlett & Co., Grain*, 659 F.2d 1314, 1319 (5th Cir. 1981). Thus, on review, we will reverse the district court's decision only if we find a clear abuse of discretion. *See, e.g., State Office Systems, Inc. v. Olivetti Corp.*, 762 F.2d 843, 845 (10th Cir. 1985); *Guest v. Bailes*, 448 F.2d 433, 437 (6th Cir. 1971).

* * *

*603 F.2d 1187, *; 1979 U.S. App. LEXIS 11368, ***
UNITED STATES of America, Plaintiff-Appellee, v.
Luis Esteban VEYTIA-BRAVO, Defendant-Appellant.
Nos. 78-5742, 78-5743
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

October 5, 1979

* * *

Fed. R. Evid. 803(6)(a) excludes from the application of the hearsay rule: memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Fed. R. Evid. 803(6) does not require that records be prepared by a business that has custody of them. If circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation. Testimony by the custodian of the record or other qualified witness that the record is

authentic and was made and kept in the regular course of business suffices to support is admission.

* * *

*254 Cal. App. 2d 901, *; 1967 Cal. App. LEXIS 1471, **; 62 Cal. Rptr. 704, * * **

VIOLET B. D'ORAZI, as Administratrix, etc., et al., Plaintiffs and Appellants, v. BANK OF CANTON, Defendant and Respondent

Civ. No. 777

Court of Appeal of California, Fifth Appellate District

October 3, 1967

* * *

However, that section relates solely to *negotiation* of commercial paper (*Wright v. Shoenhair*, 100 Cal. App. 163 [280 P. 174]), and not to an *assignment* of an interest in a note. It is unquestionably true that as to negotiation: "An endorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment." (Cal. Com. Code, § 3202, subd. (3).)

In 80 American Law Reports at page 414, the following general rule is stated with respect to the right to enforce in equity a partial assignment when all of the parties to the debt are joined in a single action such as we have here: "Notwithstanding many broad statements seemingly to the contrary met with in courts of law or elsewhere, the rule overwhelmingly supported by the cases wherein the point has been involved or squarely considered is that the assignment of part of a debt, although unassented to by the debtor, is enforceable against him in equity. The reasons, and apparently the only reason, obtaining at law for refusing to enforce such an assignment, that if given effect the debtor would be deprived of

the right to pay his debt in solido and might be subjected to many actions, embarrassments, and responsibilities not contemplated in his original contract, does not apply in equity, whose procedure contemplates that all persons at interest be made parties and have their rights determined by a single decree; consequently, in equity, the rule denying validity to such assignments ought not to, and generally does not, obtain."

California cases cited in support of that law note recognize, or clearly intimate, the existence of the rule, as follows: *Pierce v. Robinson*, 13 Cal. 116; *Pope v. Huth*, 14 Cal. 403; *Grain v. Aldrich*, 38 Cal. 514 [99 Am.Dec. 423]; *Goldman v. Murray*, 164 Cal. 419 [129 P. 462]. (*See also Kent v. Kent*, 6 Cal.App.2d 488 [44 P.2d 445]; 5 Cal.Jur.2d Rev., Assignments, § 44, pp. 431-433, § 68, p. 476; 8 Cal.Jur.2d, Bills and Notes, § 51, pp. 382-383; 6 Am.Jur.2d, Assignments, § 76, pp. 257-259, § 77, pp. 259-261; Rest., Contracts, § 156.)

* * *

*58 Cal. App. 3d 555, *; 1976 Cal. App. LEXIS 1540, **;*
*- 129 Cal. Rptr. 852, * * * ;*
19 U.C.C. Rep. Serv. (Callaghan) 544
SECURITY PACIFIC NATIONAL BANK et al.,
Plaintiffs and Respondents, v.
J. THOMAS CHESS et al., Defendants and Appellants
Civ. No. 46439
Court of Appeal of California,
Second Appellate District, Division Four
May 20, 1976

* * *

The only court decision which plaintiff cites for its interpretation of section 3201 is *Bowling Green Inc. v. State Street Bank and Trust Co.* (1st Cir. 1970) 425 F.2d 81. In that case Bowling Green negotiated a government check to Bowl-Mor, who deposited the check in State Street Bank. The bank immediately credited a portion of the check against an overdraft in Bowl-Mor's account, and shortly afterwards applied the balance in that account against debts which Bowl-Mor owed the bank. There was no evidence that Bowl-Mor had indorsed the check. The ground of the Court of Appeals decision, as stated in its opinion, is as follows: " . . . We therefore hold that a bank which takes an item for collection from a customer who was himself a holder need not establish that it took the item by negotiation in order to satisfy § 4-209 [of the Uniform Com. Code, corresponding to California Uniform Com. Code. § 4209]." (*Id.*, at p. 84.)

In the course of its discussion the court said: " . . . The issue, however, is not whether the Bank bears the burden of proof, but whether it must establish that it took the item in question by endorsement in order to meet its burden. We think not. The evidence in this case indicates

that the Bank's transferor, Bowl-Mor, was a holder. Under Mass.Gen.Laws Ann. c. 106, § 3-201 (a), transfer of an instrument vests in the transferee all the rights of the transferor. As the Official Comment to § 3-201(a), transfer of an instrument vests in the transferee all the rights of the transferor. As the Official Comment to § 3-201 indicates, one who is not a holder must first establish the transaction by which he acquired the instrument before enforcing it, but the Bank has met this burden here." (*Id.*, at p. 83-84.)

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*15 Cal. App. 4th, 1290, *; 1993 Cal. App. LEXIS 525, **; 19 Cal. Rptr. 2d 200, * * * ; 93 Cal. Daily Op. Service 3599*
PETER K. WHITE, as Trustee, etc.,
Plaintiff and Appellant, v. MICHAEL JAMES MORIARTY,
Defendant and Appellant.
No. A055618
COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION ONE
May 14, 1993, Decided

* * *

Because there was substantial evidence that Moriarty expressly ratified prior acts in connection with the purchase and financing of the camera, there is no need to discuss White's argument regarding the alternative theory of ratification by acceptance of benefits. Regarding Moriarty's contention that he never assumed personal liability for the corporate debt, we observe that the note was signed only in the individual capacities of Anderson and Moriarty. The only mention of the corporation was that the debt was secured by the camera and the equipment lease from Nisus Video. There is no issue of alter ego liability.[2]

* * *

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[2] Without citation of authority, Moriarty argues that there was no substantial evidence that White actually acquired the note from the FDIC. However, the note bears the endorsement of FDIC to GFS and from GFS to White. A person in possession of an instrument endorsed to him is the holder of the instrument. (Cal. U. Com. Code, § 1201, subd. (20).) Signatures are presumed genuine in the absence of contrary evidence. (Cal. U. Com. Code, former § 3307, subd. (1)(b).) Furthermore, an obligation possessed by a creditor is presumed unpaid. (Evid. Code, § 635; Cal. U. Com. Code, former § 3307, subd. (2).) In the absence of any contrary evidence, the endorsements on the promissory note constituted substantial evidence of White's status as holder of the note.

Supreme Court, U.S.
FILED
MAY 6 2002
OFFICE OF THE CLERK

No. 01-1364

IN THE

SUPREME COURT OF THE UNITED STATES

WALTER JITNER

Petitioner

v.

COMMERCIAL FINANCIAL/SPC ACQUISITIONS, INC.-

and

FINANCIAL COLLECTIONS, INC.

On Petition for Writ of Certiorari
To The U.S. Ninth Circuit Court of Appeals #98-56810

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER JITNER
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Petitioner Pro Se

BEST AVAILABLE COPY

Questions Presented for Review

Respondants seek to alter the questions raised by JITNER's Petition. Respectfully JITNER submits that the federal issues raised by his petition are covered by the following two questions:

1. In an area of law regulated by Congress, but where Congress has not passed legislation relating to a specific issue, and when the United States Supreme Court therefore has said to look to applicable State law, may the lower federal courts disregard State law and instead create their own federal common law?

2. Assume the FDIC is in possession of a note which is not made payable to it. What requirements must be met before the FDIC has rights under the note? The 1st Circuit Court of Appeal held this question must be answered by State Law, in that case, the law of Maine. Applying that law the court held possession of the note is not sufficient; rather, the FDIC must also prove the transaction through which it acquired the note. If state law applied in the instant case it would be California law which is identical to that of Maine. The 9th Circuit in the instant case did not follow state law; in direct conflict with the 1st Circuit it formulated a federal common law rule of the case by which possession alone (without proof of the transaction through which the FDIC acquired the note) is sufficient to give the FDIC rights in the note which may be assigned to plaintiff. Which Circuit is correct?

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I
NOTATION SCHEME

Petitioner, JITNER, pursuant this Court's Rule 15.6, is constrained to reply to several misstatements of fact as well as mischaracterizations which appear in Respondants' "Brief in Opposition". In this Reply "RBO, p5" will be a reference to page 5 of that brief; "PC, p5", to page 5 of the Petition for Certiorari. There are two further references: "OB, p5" will refer to page 5 of JITNER's opening brief below and "ER, p5", to page 5 of the Excerpts of Record filed below.

II
INTRODUCTION

This remains a simple case which raises two federal issues. First, JITNER signed two notes, one payable to BEVERLY bank and the other to INDEPENDENCE bank. The FDIC, apparently, came into possession of the notes, which show NO endorsement from the banks to the FDIC. the FDIC endorsed the notes to plaintiffs who sued JITNER. In the trial court plaintiffs presented two declarations stating that the FDIC obtained the notes as receiver of the payee on the face of the notes (i.e. the banks). JITNER objected to consideration of the declarations on evidentiary and Civ Rule 56(e) grounds. Over his objections the trial court considered the declarations, based upon them found the FDIC was the banks' receiver and gave plaintiffs summary judgment.

JITNER appealed claiming that the trial court's denial of his evidentiary and Civ. Rule 56(e) objections

was error. The 9th Circuit found it unnecessary to address these objections because it formulated a federal common law rule[1] of the case that made the FDIC's mere possession of the notes sufficient for the FDIC to obtain rights in the notes which it could assign to plaintiff. This federal common law rule is in direct conflict with Cal Comm Code § 3203 and official comment 2 thereto (hereafter "§3203"). In O'Melveny & Myers v FDIC 512 US 79, 114 S. Ct. 2048, 129 L. Ed 67 (1994) this court, in reversing a 9th Circuit case, held that in the absence of a federal statutory rule governing the FDIC, state law must apply; the courts are not free to create federal common law. The first federal issue is whether by formulating its common law principal the 9th Circuit violated this court's holding in the O'Melveny & Myers case.

Second, in the 1st circuit case, FDIC v Houde 90 F. 3d 600 (1st cir, 1996), the facts were strikingly similar to those of the instant case[2]. The 1st Circuit held against the FDIC having enforceable rights stating that under State law in order to obtain rights in the note the FDIC had to prove the transaction through which it acquired the note. The 9th Circuit, in direct conflict with the 1st Circuit, dispensed with the need for the FDIC to prove the transaction through which it acquired the note. The second federal issue is whether the Houde court or the 9th Circuit is correct.

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1. Federal common law because the court points to No federal statutory authority for its position.
2. In Houde the focus is on the break of chain of title to the note was between a bridge bank and the FDIC; in the instant case between the original bank and the FDIC.

III
MISTATEMENTS

A. Respondents Falsely State That The FDIC's Receivership Is Not in Dispute

Respondents assert it is undisputed that "the FDIC took over that bank [payee on the face of the notes] and acquired its assets" RBO, p1. This is false. JITNER's appeal below argued there was no competent evidence to prove the findings of fact of the trial court, including the fact that the FDIC was the receiver of the payee banks, PC p4-6 including nt.5.

B. Respondents Falsely Assert in This Case That 12 USC § 1821 (d) (2) Preempts State Law and That the Houde Case and JITNER IGNORED That Statute

Respondents assert that 12 USC § 1821 (d) (2) trumps state law and gives the FDIC rights in the notes RBO, p2. Both the Houde court 90 F 3d at 606 and JITNER PC, p14-15 have acknowledged that IF the evidence brought the FDIC within the ambit of 12 USC § 1821 (d) (2), the FDIC, by operation of federal statutory law, would succeed to the payees' rights under the note and §3203 requirements would be satisfied. But, both have pointed out that for that section to apply there must be evidence that indeed the FDIC was appointed "conservator or receiver"; 12 USC § 1821 (d) (2) begins with: "the Corporation [FDIC] shall, as conservator or receiver, and by operation of law succeed to..." (emphasis added). The problem in the present case is that; (1) at trial there was no competent evidence of the FDIC's receivership and, (2) at the appellate level, the 9th Circuit federal

common law rule of the case dispenses with the need to prove how the FDIC acquired the notes (i.e dispenses with the need to prove the FDIC receivership.)[3]

To paraphrase the Respondents statement at RBO, p7: "Respondents apparently assume that 12 USC § 1821 (d) (2) does not mean what it says; namely, that it does not mean that before the FDIC can assert rights under that section it must first prove its receivership by competent evidence."[4]

C. Respondents' Falsely Assert That the Trial Court Relied on Declarations of the FDIC Assignees' Custodians of Records

Respondent's assert that the declarations in support of summary judgment were of the FDIC

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3. The trial court, over JITNER's evidentiary and Civ Rule 56 (e) objections, considered certain declarations which asserted the FDIC's receivership. This in part, was the basis of JITNER's appeal. The 9th Circuit did not address those objections because its ruling dispensed with: 1) the need to prove the FDIC receivership in order to bring the matter within 12 USC § 1821 (d) (2); or, 2) the need, under Cal Comm Code § 3203 to prove the transaction through which the FDIC obtained the notes PC, p8-9. Thus, the 9th Circuit turned its back on this court's rule in O'Melveny & Myers v. FDIC 512 US 79 and refused to apply California law.

4. Respondents tacitly acknowledge that the Houde opinion and the 9th Circuit's opinion are irreconcilable. This surely is grounds for Certiorari.

assignees' custodians of records. RBO, p4 and 1. The declarants were not custodian of the records and they were not even employees of the FDIC assignees; rather, they were employees of the assignees' servicing agent PC, p4[5], a completely separate entity from the assignees. (Note in Houde 90 F 3 at 606 the FDIC's custodian of records testimony that FDIC records would reflect the FDIC receivership was not competent evidence to establish receivership)

It is ironic that Respondents argue that "documents can speak for themselves" RBO, p4, when these declarations did not provided the documents upon which declarants relied and which would have proven the declarants' assertions of the FDIC receivership PC, p5, at nt. 5; instead they had the declarants speak for those documents.[6]

D. The California Cases Cited by Respondents Actually Support JITNER's Position

Respondents cite three Californian cases to support their assertion that JITNER mistakes the import of Cal Comm Code § 3203 ("§ 3203") RBO,

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5. At ER, p 135 declarant in paragraph 4 states, "I am the Compliance Officer employed by Commercial Financial Services, Inc [referred to in PC, p4 as "SERVICES] the provider of services to CFS ["Commercial"] and at ER p563 in paragraph 5 the declarant states the same thing regarding "FCI" [i.e. FINANCIAL]

6. The declarants at ER, p134 and p562, in paragraph 5, state that their factual assertions are based upon their conclusions as to what the records would reflect.

p7-9. While that for which these cases stand is irrelevant to the federal issues raised, out of an abundance of caution JITNER points out that Respondants use of these cases is misleading.

The quotation from Security Pac Nation Bk v. Chess (1976) 58 Cal App 3d 555, 565 upon which Respondents rely (RBO, p8) is actually a Federal Court's interpretation of Massachusetts law. The California court goes on to state that the quote can be read as irreconcilable with the language of Cal Comm Code § 3201 (hereafter "§ 3201") 58 Cal App 3d at 365-66.

It is also misleading to cited the Chess case for the proposition that JITNER's reliance on § 3203 is misplaced because The Chess court actually relied on § 3203; however, at that time the content of § 3203 appeared in then Cal Comm Code § 3201. In 1992 § 3201 was repealed and reenacted as current § 3203[7]. The Chess court relied on § 3201 (now § 3203) to indicate plaintiff was transferee of the note. It is significant that the Chess court's comment on § 3201 (now § 3203) is: "one who is not a holder must first establish the transaction by which he acquired the

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7. The "History and Statutory Note" following § 3203 and § 3201 in the annotated codes will show that in 1992 old § 3201 was repealed and reenacted as current § 3203.

instrument before enforcing it"[8] 58 Cal App 3d at 565.

In D'Orazi v Polz of Canton (1967) 254 Cal App 2d 901 the facts indicate that the note was made payable to a company and on the back of the note there was an assignment by the payee of a one-half undivided interest in the note to plaintiff 254 Cal App 2d at 903; there was no break in the chain of title to the note. In the instant case there is no evidence of an assignment to the FDIC by payees; and thus, there is a break in the chain of title.

The quote in White v Moriarty (1993) 15 Cal App 4th 1290, 1296 nt 2, relied on by Respondents (RBO, p8-9), is incomplete and misleading. Unlike the instant case nowhere in White was the issue raised as to the FDIC's rights in the note. The issue addressed in nt 2 was soley whether there was an FDIC assignment to plaintiff; Respondents omitted the following which immediately preceded the words they quoted 15 Cal App 4th nt 2 at 1296.

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8. The Chess case found that plaintiff had rights under the note not endorsed to it because plaintiff had an assignment from a holder. However, plaintiff could not be a holder, because a holder must be in possession of the note and the instrument must be made payable to him. Cal Comm Code § 1201 (20) The Chess plaintiff was a transferee under old § 3201 (now § 3203) because of an assignment separate from the note. He could not be holder because the note was not made payable to him 58 Cal App 2d at 562; just as in instant case the notes nowhere on their face are made payable to the FDIC. Furthermore, the 9th Circuit ignored JITNER's claim that there was no competent evidence the FDIC was a transferee under § 3203.

> Moriarty [defendant] argues that there was not substantial evidence that White [plaintiff] actually acquired the note from the FDIC. However the note bears the FDIC endorsement to GFS and from GFS to White.

The parties on appeal did not question whether the FDIC was in a position to enforce the bank's note. It is clear that the only claim of break in the chain of title to the note on appeal was from the FDIC to plaintiff and that was refuted by the evidence at trial.

In summary, the Chess case: (1) actually questions the quotation relied on by Respondent, (2) did rely on old § 3201 (present § 3203) and (3) affirmed the need for a possessor who is not a payee on the note to prove the transaction through which he acquire the note before he can enforce it. In the D'Orazi and White cases, based on the evidence, there was no break in the chain of title from the payee on the note to the plaintiff. Key to the case at hand is the claim of a break in the chain of title PC, p2-4.

E. Respondants Erroneously Attempt To Limit This Court's Holding In O'Melveny & Myers

Respondents assert that JITNER's reliance on O'Melveny & Myers v FDIC 512 US29, 114 S. Ct 2048, 129 L.Ed 2d 67 (1994) is misplaced since the case held that California tort law applied because there "was no Federal common law as to the tort involved" RBO, p5. First, the Court held there could be no Federal common with regard to the FDIC. Second, that statement underscores the need for this court to grant certiorari

because the holding in O'Melveny & Myer is broader than that. It holds that ANY issue not expressly covered by the federal FDIC statutory scheme must be decided by State law -- the courts are not free to create Federal common law. JITNER recognized that if there was competent evidence of the FDIC's receivership, then under 12 USC § 1821 (d) (2) there would be no break in the notes' chain of title PC, p14-16[9]; and, the requirement of § 3203 would be satisfied. In the absence of competent evidence which brings the FDIC within the ambit of 12 USC 1821 (d) (2) (namely, in the absence of competent evidence of an FDIC receivership), California law would apply and there would have to be proof of the transaction through which the FDIC obtained the notes. JITNER's appealed to the 9th Circuit asserting a break in the chain of title because the only evidence offered to establish the transfer of rights to the FDIC was evidence to which JITNER objected on evidentiary on Civ Rule 56(e) grounds. Because the trial court ignored his objections he appealed, claiming error based on the trial court's reliance on the declarations to which he had objected.

It is beyond dispute that the 9th Circuit's opinion avoided addressing these evidentiary and Civ Rule 56(e) objections because by its own Federal common law rule of the case it dispensed with the need to prove the transaction through which the FDIC acquired the note. Thus, in contradiction to § 3203, it held that mere possession of the notes by the FDIC (without

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9. This discussion was raised below in JITNER's opening brief at OB, p27-29 and in his Petition for the Rehearing below.

proof of the transaction through which it acquired them) was sufficient for the FDIC to acquire rights in the notes which it could assign to plaintiffs PC, p8-10. In so holding the 9th Circuit not only formulated a federal common law rule in contradiction to § 3203; but, it also ignored and turned its back on this Court's O'Melveny & Myers holding. Further it also set itself in direct opposition to the Houde case.

IV
CONCLUSION

The basic issue raised in JITNER's Petition remains. JITNER asserts there was no competent evidence: 1) of an endorsement to the FDIC; 2) of an FDIC receivership; or, 3) of the transaction through which the FDIC acquired the notes. The 9th Circuit, consistent with this court's holding in O'Melveny & Myers, should not be allowed to avoid addressing these claimed errors in law by fashioning a federal common law rule in conflict with California law; namely, a rule which allows mere possession of the note by the FDIC to be sufficient for the FDIC's acquisition of rights under the notes which it can in turn assign to plaintiffs. Rather, this court should affirm the opposite point of view expressed in FDIC v Houde, supra, which is the view required by this Court's O'Melveny & Myers holding and by California law.

Respectfully submitted,

WALTER JITNER
Petitioner in Pro Se

APPENDIX

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Excerpt from Page 85 of O'Melveny & Myers v FDIC
512 US 79, 85; 1145 Ct. 2048;
129 L.Ed 67 (1994)

In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made - rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.

Excerpts from Pages 606 and 607 of FDIC v Houde
90 F3d 600

What remained, therefore, was for the FDIC to establish a proper transfer of the Note to it in its suing capacity (receiver of NMNB) from the Note's holder, MNB.

(5) The first step in this transfer could rather have been established given the provisions of FIRREA. A transfer of all the holder's (MNB's) rights in the Note to the FDIC as receiver for MNB could be demonstrated simply by showing that the FDIC became the receiver of MNB. Once a receivership of a failed bank takes place, the transfer of the failed bank's assets to the FDIC occurs by operation of law - the FDIC as receiver of a failed institution succeeding under federal law to:

> (i) all rights, titles, powers, and privileges of the insured depository institution.
>
> (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

12 U.S.C. § 1821 (d) (2) (A)

(6) The most serious problem in the instant case is what additional proof is needed to prove that enforceable title to the Note was transmitted to the FDIC in its subsequent and present capacity as receiver of the bridge bank, NMNB. Under the Maine negotiable instruments law, there has to be "(p)roof of a transfer to the transferee by a holder" of the Note, establishing "proof that the transferee (i.e., the FDIC as receiver of NMNB) has acquired the rights of a holder (MNB)." 11 M.R.S.A. § 3-1203. Comment 2, supra. As stated above, if the FDIC were suing in the capacity of receiver of MNB, nothing more would be required than a showing of such receivership, coupled with a production of the Note, for the FDIC to become entitled

to the presumption that it was entitled to payment.

The FDIC relied on the testimony of its witness, Golden, to show this. Golden testified, among other things, to the FDIC's receivership of MNB, the creation of NMNB, the subsequent dissolution of NMNB, the subsequent dissolution of NMNB, and the Note's transfer to the FDIC as NMNB's receiver. The court, however, struck Golden's testimony. We agree with the court that Golden, having taken over the Houde file only two weeks before trial and not claiming direct personal knowledge of these events, could not testify to them over objection. See Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.") Although, as custodian of the Houde file, his testimony might well have been sufficient to authenticate business records, admissible under an exception to the hearsay rule, that may have proved the underlying transactions, see Fed.R.Evid. 803(6), the FDIC did not have any of the underlying documents with it at trial.

(8) Attempting to justify the lack of admissible foundation evidence, the FDIC now argues that because the Note was never indorsed and never made payable to anyone other than MNB, it plainly could not have been sold to a third party by the FDIC or the bridge bank. But while the absence of an indorsement on the Note strengthens the argument that no one acquired a title superior to that of the FDIC, it does not by itself meet the FDIC's burden to "account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it." 11 M.R.S.A. § 3-1208, Comment 2, supra/

12 USC § 1821 (d) (2) (A)

12 U.S.C. § 1821

(d) Powers and duties of Corporation as conservator or receiver

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to-

(i) all rights, titles, powrs, and privileges of the insured depository institution and of any stockholder, member, account-holder depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

Excerpt from Page 565 of Security Pacific Nat. Bank v Chess 58 Cal App 3d 555

The only court decision which plaintiff cites for its interpretation of section 3201 is Bowling Green Inc. v. State Street Bank and Trust Co (1st Cir. 1970) 425 F.2d 81. In that case Bowling Green negotiated a government check to Bowl-Mor, who deposited the check in State Street Bank. The bank immediately credited a portion of the check against an overdraft in Bowl-Mor's account, and shortly afterwards applied the balance in that account against debts which Bowl-Mor owed the bank. There was no evidence that Bowl-Mor had indorsed the check. The ground of the Court of Appeals decision as stated in its opinion, is as follows: "...We therefore hold that a bank which takes an item for collection from a customer who was himself a holder need not establish that it took the item by negotiation in order to satisfy § 4-209 [of the Uniform Com. Code, corresponding to California Uniform Com. Code, § 4209]." (Id., at p.84).

In the course of its discussion the court said: "... The issue, however, is not whether the Bank bears the burden of proof, but whether it must establish that it took the item in question by endorsement in order to meet its burden. We think not. The evidence in this case indicates that the Bank's transferor, Bowl-Mor, was a holder. Under Mass. Gen. Laws ann. c. 106, § 3-201(a), transfer of an instrument vests in the transferee all the rights of the transferor. As the Official Comment to § 3-201 indicates, one who is not a holder must first establish the transaction by which he acquired the instrument before enforcing it, but the Bank has met this burden here." (id., at p. 83-84).

To the extent that Bowling Green interprets and applies division 4 generally and section 4209 in particular, it is distinguishable from the case at bench. Bowling Green involved an item taken by the bank for collection and deposited to the customer's account. Our case does not.

If the Bowling Green court intended to say that a transfer by a holder without indorsement gives the transferee the status of a holder, that statement is irreconcilable with the language of section 3201 and with the case law cited above, interpreting section 3201 and its antecedent in the Negotiable Instruments Law.

Footnote 2 on Page 1296 of White v Moriarity 15 Cal App 4th 1290

Without citation of authority, Moriarity argues that there was no substantial evidence that White actually acquired the note from the FDIC. However, the note bears the endorsement of FDIC to GFS and from GFS to White. A person in possession of an instrument endorsed to him is the holder of the instrument. (Cal. U. Com. Code § 1201, subd. (20).) Signatures are presumed genuine in the absence of contrary evidence.

(Cal. U. Com. Code, former § 3307, subd. (1) (b).) Furthermore, an obligation possessed by a creditor is presumed unpaid. (Evid. Code, § 635; Cal. U. Com. Code, former § 3307, subd. (2).) In the absence of any contrary evidence, the endorsements on the promissory note constituted substantial evidence of White's status as holder of the note.

Excerpt from Page 903 of D'Orazi v Bank of Canton
(1967) 254 Cal App 2d 901

Joseph handled all of the details of the transaction, and under his contract with D'Orazi Investment Company he was entitled to the sum of $15,000 from the commission of $25,000. This commission was to be paid by the Wardas in the following way: $5,000 in cash and $20,000 by promissory note. Joseph F. D'Orazi, however, agreed with his brother to take a smaller share of the commission: $3,000 in cash and a one-half interest in the promissory note. The $5,000 was accordingly split between the two brothers with $3,000 going to Joseph and $2,000 to Victor. The Escrow and Title Service of Turlock, as escrow holder, was directed to show by proper documents the agreement which had been reached by the two D'Orazis and the Wardas. In compliance with that arrangement, the escrow company sent to Victor W. D'Orazi in San Francisco an unsigned promissory note and Victor W. D'Orazi signed and sent back to the escrow company a writing contained on the back of the note reading: "The undersigned hereby assigns an undivided one-half interest in the within note, without recourse, to Joseph F. D'Orazi.

Historical and Statutory Notes to Former Cal Comm Code § 3201 and current § 3203

1992 Legislation

Legislative intent of State 1992, c. 914 (S.B.838) see Historical and Statutory Notes under § 1201.

Former § 3203 was repealed by State 1992, c. 914 (S.B. 838), § 5

Derivation: Former § 3201 enacted by States. 1986, C 819, § 3201

1992 Legislation

Legislative intent of Stats, 1992 c 914 (SB 838), see Historical and Statutory notes under § 1201

Former § 3201 was repealed by Stats. 1992 c 914 (SB 838),

See Commercial Code §§ 3203 and 3204

California Commercial Code
§ 3203 and Official Comment 2 thereto

Cal Coml Code § 3203

(a) An instrument is transferred when it is delivered by a person other than it's issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee can not acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under the Article and has only the rights of a partial assignee.

Official Comment 2 thereto

Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 8-308 that the transferee by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.